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In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS L. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DENNIS L. ROBERTS, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, *infra,* pp. App. 1-3) is not yet reported. There is no opinion from the District Court.

JURISDICTION

The Judgment of the Court of Appeals (App. A, *infra,* p. App. 4) was entered on June 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the Decision below sufficiently departs from this Court's reasoning in *Marshall* v. *U.S.*, 360 U.S. 310 (1959) so as to warrant reversal of this conviction in that during this much-publicized jury trial there was an abundance of prejudicial newspaper publicity (with inadequate inquiry by the trial judge) and a single trial juror expressed doubt as to her ability to judge the matter fairly. Was the failure to exclude this trial juror prejudicial error where two (2) alternate jurors were readily available to replace the "doubting" juror?

(2) Whether "cumulative" punishment may be imposed after a multi-count mail fraud conviction where each count in the indictment was part of the same series of transactions? Stated otherwise, is the concept of cumulative punishment in mail fraud cases lacking in due process since the decisions of this Court in *Simpson* v. *U.S.*, ... U.S. ....., 98 S.Ct. 909 (1978) and *Jeffers* v. *U.S.*, 432 U.S. 137 (1977)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . Nor be deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> ". . . In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury*. . . ."

The Eighth Amendment to the United States Constitution provides in pertinent part:

> ". . . Nor cruel and unusual punishment inflicted".

Section 1341 of Title 18 provides as follows:

§ 1341. *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949. c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

STATEMENT OF THE CASE

Petitioner, Dennis L. Roberts, was charged in February, 1977, in a fifty (50) count indictment. The charge(s) alleged that he violated 18 U.S.C. §1341 in that he devised a scheme to bilk citizens out of money. The United States Mail Service was part and parcel of the scheme. During the fall of 1976 Roberts nationally advertised the sale of digital watches. Many people sent in approximately $18.00 each and expected to receive a digital watch. Petitioner kept most of the monies, but sent no watches.

Petitioner was charged in the federal district court in Chicago, Illinois in a massive fifty (50) count indictment. Count 1 of this indictment (App. B, *infra*, pp. App. 6-17) named each of the putative mail fraud victims and reviewed in stirring detail petitioner's scheme. Counts 2 through 50 recited the names of individual victims (the same persons already set forth in Count 1). The indictment, in its entirety, spanned 61 pages and is reproduced in the original record as R. 1.

Pretrial motions to dismiss the cumulative counts of the indictment were denied, pretrial (R. 19, 20). A trial, by jury, commenced on May 16, 1977. At all times herein pertinent petitioner was represented by retained counsel. On the second day of trial certain newspaper articles portrayed the petitioner as being in custody in lieu of $500,000.00 cash bond. (Cf., App. C, *infra*, pp. App. 18-20) The trial judge inquired of the jurors regarding the article(s) and a radio report regarding the trial. Each juror assured the judge that they could be fair, notwithstanding what they had either heard or read (Tr. 264-275). In part the trial judge reported to petitioner and his attorneys as follows:

> "Two jurors saw the headline in the Tribune and both said to themselves, "That is about the case I am on, so I am going to pass this and turn the page," and they did not read the article.
>
> One juror, one of the alternates, the male alternate, while having breakfast with his wife this morning, the wife said, "Here is an article about the case in which you are involved."
>
> And he said, "Pass it and save it and I will read it when the case is over."
>
> That is the report, gentlemen.

> Mr. Peters: All right, your Honor.
>
> Mr. Tomlinson: Thank you, your Honor.
>
> The Court: All right, we will bring out the jury.
>
> Also, each one of the jurors assured me that they would not read any newspaper articles about this case or listen, knowingly listen, to any radio or television, watch any television broadcast about this case." (Tr. 274)

On the third day of trial (May 19, 1977) the trial judge received a note from one of the jurors (App. D, *infra*, pp. App. 21). At the time the note was received there were two (2) alternates available (Tr. 585, 586). Inquiry of the juror produced, in part, the following:

> "The Court: Mrs. O'Brien, sit down, please.
>
> I thought that I had finished my questions, but let me just ask this question—a couple of more questions of you.
>
> *As I understand your answer, you stated that because of your friendship with Mr. Pierchala you might tend to give his testimony more credibility than another juror would give, is that right?*
>
> Juror O'Brien: *It could possibly be.*
>
> The Court: *It could possibly be?*
>
> Juror O'Brien: *I don't know, I don't really know.*" (Tr. 589)

* * * * *

> "Mr. Bailey: Would you tend to give his testimony more credibility than that of some other witness who might testify in some way inconsistent with his testimony, because of matters that your friendship and matters that have occurred outside the courtroom? That is really the question. It is not an easy question, is it?

Juror O'Brien: *It isn't easy.*

Mr. Bailey: *No.*

Juror O'Brien: I see this man approximately twice a year. A couple of years ago we worked very hard on a project, but as far as a continual friendship on a continuing basis, I guess you would say it would not be, and I know nothing about his business. I just know him as a person *and I can't say whether inadvertently, because of my feelings, I might believe him more than another witness* perhaps. I would have weigh it all." (Tr. 591, 2)

The government urged (successfully) that Mrs. O'Brien remain as a trial juror (Tr. 586) *albeit* the defense moved that an alternate replace her. (Tr. 595). Over objection, Mrs. O'Brien remained as a deliberating trial juror.

On May 25, 1977 petitioner was found guilty by the trial juror of each count (R. 52). On July 15, 1977 petitioner was sentenced to *cumulative* fines and imprisonment.[1] Petitioner is in custody.

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[1] The sentencing order is reproduced at App. E, *infra*, p. 21, A fair reading of the sentencing order would indicate that the punishment imposed was pyramided on Counts 49 and 50. As heretofore suggested Counts 49 and 50 were part of Count 1 and a pretrial Motion to Dismiss was denied (R. 19, 20). Petitioner received the maximum sentence and fine on Counts 1 through 48. Thereafter the Court "pyramided" the punishment on Counts 49 and 50 by adding a consecutive jail sentence and cumulative fines on Counts 49 and 50. In addition a consecutive period of probation with restitution was imposed on Count 50 (Cf. App. E, p. App. 21, *infra*). This sentencing is presented in Question 2, *infra*.

REASONS FOR GRANTING THE WRIT

1. In *Marshall* v. *U.S.*, 360 U.S. 310 (1959) this Court reversed a narcotic conviction utilizing its supervisory powers (360 U.S. at 313). In *Marshall* certain newspaper articles commented as to the fact that *Marshall* had a record of previous felony convictions (id at 311, 312). The trial judge, after learning of the news accounts summoned the jurors. Upon inquiry the trial judge learned that three (3) jurors had actually read the news accounts; three (3) others had scanned either one or both of the news accounts and each of these jurors told the trial judge they would not be influenced. The trial judge, finding no prejudice to *Marshall,* denied a motion for mistrial. This Court reversed. Utilizing the supervisory powers of this Court the *per curiam* opinion, in part, states:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021. Generalizations beyond that statement are not profitable, *because each case must turn on its special facts.* We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson* v. *United States,* 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (*Bruno* v. *United*

States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257; *McNabb* v. *United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819) we think a new trial should be granted." (360 U.S. at 312, 13)

Case law provides additional insight. The question of "a fair and impartial jury" is pregnant with the concept that each defendant is entitled to have *all* the jurors fair and impartial. A plethora of situations are called into account. In the case at bar not only was there a series of newspaper accounts demonstrating, *inter alia,* that the petitioner was in custody[1a] in lieu of a $500,000.00 bond but, further, one of the trial jurors actually told the trial judge she would have difficulty being fair. Against this tainted background we suggest that the case of *Jackson* v. *U.S.,* 395 F.2d 615 (D.C. Cir., 1968) is appropriate. In *Jackson* the Court reversed a murder conviction finding that *Jackson* was denied a fair trial where, post-trial, it was shown that one of the trial jurors (Kemper) had earlier been involved in a love-triangle murder (id at 616). As may be pertinent to our case, the *Jackson* Court stated:

> "The *Sixth Amendment* commands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* * * *." (Emphasis supplied) Where prejudice is manifest, a trial court's findings of jurors' impartiality should be set aside. *Irvin* v. *Dowd,* 366 U.S. 717, 723-724, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Reynolds* v. *United States,* 98 U.S. 145, 156, 25 L.Ed. 244 (1878). As was noted in *Irvin,* " '[i]mpartiality is not a technical conception.

[1a] In *Taylor* v. *Kentucky,* ..... U.S. ....., 98 S.Ct. 1930 at 1935 (1978) this Court declared that, *inter alia,* guilt or innocence shall be determined based on evidence introduced at trial and not on grounds of . . continued custody . . (98 S.Ct. at 1935).

> It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' " 366 U.S. at 724-725, 81 S.Ct. at 1643-1644, quoting Chief Justice Hughes in *United States* v. *Wood,* 299 U.S. 123, 145-146, 57 S.Ct. 177, 81 L.Ed. 78 (1936)" (emphasis supplied, footnotes omitted, 395 F.2d at 617).[2]

Racial prejudice is none the different. The constitutional right is to a trial by an impartial jury. In *U.S.* v. *Booker,* 480 F.2d 1310 (7th Cir., 1973) the Court reversed a narcotic conviction finding that the trial court committed prejudicial error in refusing to interrogate prospective jurors on the subject of possible racial prejudice. *Booker* was a black defendant and five (5) of the trial jurors were black. The Court reversed and, in part, stated:

> "For if even *one member* of the jury harbors racial prejudice against the accused, *his right to trial by an impartial jury is impaired.*" (480 F.2d at 1311)[3]

In *U.S.* v. *Gilbert,* 446 F.2d 559 (5th Cir., 1971) the Court addressed an issue:

> "That he was denied his constitutional right to trial by a fair and impartial jury" (id at 559).

In *Gilbert* after the jury had retired to deliberate one of the jurors reported that she could not be fair if a past newspaper account involved the same defendant (id at 560). The trial court inquired of the juror as did counsel (id at 560). The defendant's motion for a mistrial was denied. The Court reversed the weapons conviction stating:

[2] Burger, J., [Chief Justice], concurring.

[3] Stevens, Jr., [Justice] writing the opinion for the Court.

> "We believe that it was the clear duty of the trial court, in these circumstances, to declare a mistrial and empanel another jury to try the defendant." (446 F.2d at 560).

Within the parameters of this trial record two (2) conclusions may safely be found. The first, that there was prejudicial newsp. per publicity, during trial (See App. C, *infra,* App. 18-20). Included in the reproduced appendices are the simple statements, *inter alia,* that the petitioner at bar was in custody in lieu of $500,000.00 bond, App. C, *infra,* App. 18-20. The second conclusion that may be safely drawn from this record is that one of the trial jurors was troubled. Troubled to the point where she exclaimed that "she didn't really know whether her friendship with a government witness could make a difference in her deliberations (Tr. 589) and that, on the same subject, "it wouldn't be easy" to set aside her friendship with a government witness (Tr. 591, 592).[4] In the view of the petitioner these two (2) ingredients, *aliunde,* provide ample reason for the granting of this petition. In *Donovan* v. *Davis,* 558 F.2d 201 (4th Cir., 1977) the Court reversed the denial of habeas

[4] We have paraphrased from the trial transcript. The exact language, of course, has been reproduced at pp. 5-6 *ante.* At this juncture we deem it appropriate to candidly advise this court that we do not attack the government's proof as being insufficient, nor do we suggest that the "mailings" were not in furtherance of 18 U.S.C. §1341 . . . cf., *U.S.* v. *Maze,* 414 U.S. 395 (1974). As regarding the *quantum* of evidence vs. prejudice in the type of situation at bar, the court has found that it matters not that the government's proof may have been strong [or even overwhelming]. The constitutional mandate compels the grant of a new trial where an impartial jury [juror] is demonstrated, *Aldridge* v. *U.S.,* 283 U.S. 308 (1930) and *U.S.* v. *Booker,* 480 F.2d 1310 (7th Cir., 1973), Stevens, J.

relief to a state inmate. The issue ran to whether *Donovan* was denied his federal constitutional right to an *impartial* jury where several panel members had previously served on a jury which acquitted Donovan of a related charge (id at 202). While reversing the denial of relief the *Donovan* Court stated the matter simply as follows:

> "*Donovan* had a federal constitutional right to an impartial jury:
>
> > In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of *impartial,* "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.
>
> *Groppi* v. *Wisconsin,* 400 U.S. 505, 509, 91 S.Ct. 490, 492, 27 L.Ed.2d 571 (1971); *Irvin* v. *Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)." (558 F.2d at 202)

We do not chose to mislead the court. During trial, the judge gave the petitioner the opportunity to prove or demonstrate the bias of the trial juror, Mrs. O'Brien (Tr. 589-95). In *Mikus* v. *U.S.,* 433 F.2d 719 (2nd Cir., 1970) the Court "set forth" the applicable rules and cases, from this Court, on jury bias as follows:

> "[t]he affirmative of the issue is upon the challenger. Unless he shows that actual existence of such *an opinion in the mind of the juror as will raise the presumption of partiality* the juror need not necessarily be set aside." *Reynolds* v. *United States, supra,* quoted in *Irvin* v. *Dowd, supra.*" (433 F.2d at 723; emph. supplied)
>
> • • • • •
>
> "Preservation of the opportunity to prove *actual bias* is a guarantee of a defendant's right to an impartial jury. *Dennis* v. *U.S., supra,* 339 U.S. at 171-172, 70 S.Ct. at 723" (433 F.2d at 724).

During trial, the petitioner was given the opportunity to offer evidence of bias after the juror, *sua sponte,* brought forward information. This information was that she was a friend of an earlier government witness. Upon examination she clearly expressed "some difficulty" in weighing the credibility of this particular government witness, as opposed to other witnesses (Tr. 587-92). In *U.S.* v. *Robinson,* 485 F.2d 1157 (3rd Cir., 1973) the Court reversed a draft board conviction where jury impartiality was an issue on appeal. While reversing, the *Robinson* Court stated:

> "Both sides in a jury trial are entitled to have the credibility of witnesses judged by relevant standards. Both sides—but *especially defendants*—are entitled to remove for cause prospective jurors who would judge credibility of witnesses by improper standards." (485 F.2d at 1159)

As to the first question presented in our petition, we respectfully urge that the writ of certiorari be granted and this Court reverse and remand this conviction for a new trial.[5]

---

[5] In *U.S.* v. *Allsup,* 566 F.2d 68 (9th Cir., 1977) the Court reversed a bank robbery conviction while reviewing the total question of jury-bias. We could not improve on the *Allsup* analysis (566 F.2d 70-72; concurring opinion, 73-76).

Jury bias is recognized in different trial situations, (e.g., improper voir dire, *Booker, ante,* "in-trial publicity" leading to jury bias, *Marshall, ante,* and post-trial revelations regarding a jurors prejudice, *Robinson, ante.* The case at bar apparently falls within the *Marshall* dogma, but the analogies in *Booker* and *Robinson* and *Allsup,* all combined to stand for the simple proposition that the petitioner is entitled to a "fair and *impartial*" jury.

2. Was (is) cumulative punishment authorized where the same "continuing scheme" gives rise to each and every count in an indictment?? And, the fifty (50) count indictment charges the same statutory violation IN EACH COUNT?? Does this amount to pyramiding?? In our view, the answer is yes. Conversely, we take this Court's recent decisions as standing for the proposition that the *Double Jeopardy Clause* "protects against multiple punishment for the same offense" . . . *Simpson* v. *U.S.,* ..... U.S. ....., 98 S.Ct. 909 at 912, n. 5 (1978). In *Simpson* this Court ruled that the petitioners could not be the subject of multiple or cumulative punishment based upon armed bank robbery with a deadly weapon, *albeit* the deadly weapon aspect fell within the parameters of a separate statute (18 U.S.C. §924(c)). In pertinent part, while finding that armed bank robbery actually was a single transaction, *albeit* the firearm portion of the statutory violation was without the parameters of 18 U.S.C. §2113(a). In *Simpson, inter alia,* this Court stated:

> "The Double Jeopardy Clause 'protects against multiple punishment for the same offense,' *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), and prohibits multiple prosecutions for the 'same offense,' *Jeffers* v. *United States,* 432 U.S. 137, 150-151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977)." (98 S.Ct. 912, n.5)

In like fashion this Court precluded cumulative punishment for what amounted to the "same offense" in *Jeffers* v. *U.S.,* 432 U.S. 137 (1977). In *Jeffers* this Court tracked the statutory scheme under Title 21 as it related to the Federal Control Substances Act. Notwithstanding two (2) trials wherein *Jeffers* was tried and convicted for two (2)

separate statutory violations this Court concluded that cumulative punishment was not warranted where *Jeffers* was convicted, in separate trials, of violating 21 U.S.C. §846 and 21 U.S.C. §848 (*Jeffers,* 97 S.Ct. at 2219). In *Jeffers,* while declining the invitation to find cumulative punishment, this Court posed the question as follows:

> "The critical inquiry is whether Congress intended to punish each statutory violation separately. See, *e. g., Prince* v. *United States,* 352 U.S. 322, 327, 77 S.Ct. 403, 406, 1 L.Ed.2d 370 (1957); *Callanan* v. *United States,* 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961); *Milanovich* v. *United States,* 365 U.S. 551, 554, 81 S.Ct. 728, 729, 5 L.Ed.2d 773 (1961). Cf. *Bell* v. *United States,* 349 U.S. 81, 82, 75 S.Ct. 620, 621, 99 L.Ed. 905 (1955) See also *Gore* v. *United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958). In *Iannelli* v. *United States, supra,* the Court concluded that Congress did intend to punish violations of § 1955 separately from § 371 conspiracy violations. Since the two offenses were different, there was no need to go further. See 420 U.S., at 785-786, nn. 17-18, 95 S.Ct., at 1293-1294. If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties. See *North Carolina* v. *Pearce,* 395 U.S., at 717, 89 S.Ct., at 2076; *United States* v. *Wilson,* 420 U.S. 332, 343, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975)." (97 S.Ct. 2218; fn. omitted)

In 1916 this Court ruled that each mailing was a "separate offense" . . . *Badders* v. *U.S.,* 240 U.S. 391. The Circuits have repeatedly ruled in like fashion. Now, 62 years later, we respectfully suggest that for the purposes of "*multiple punishment*" this Court re-evaluate the *Badders* doctrine. Of late, cumulative punishment has been the subject of plenary review, both in this Court and the courts below. With unerring frequency the Court(s) have refused to "pyramid" or make "cumulative" penalties where, as here, the same events comprised the *sine quo non* of the indictment and conviction. In the case at bar there can be little question but that the multi-count indictment charged a "single continuing scheme or offense". The government has not opted to the contrary. Rather, with each "mailing" being a separate offense (*Badders, ante*) the government takes the view that *pyramided* punishment is applicable. We say no.

Examples of the Circuit splits are demonstrative of our position.[5a] For example, in *U.S.* v. *McDaniel,* 550 F.2d 214

[5a] In *U.S.* v. *Honneus,* 508 F.2d 566 (1st Cir., 1974) the Court found a massive narcotic smuggling indictment charging, *inter alia,* three (3) separate conspiracies under three (3) separate statutory subsections was susceptible of but a single sentence (id at 569, 570). On the other hand in *U.S.* v. *Garner,* 574 F.2d 1141 (4th Cir., 1978) the Court ruled that cumulative (consecutive) ten (10) year sentences for violating the federal narcotic statutes were permissible (id at 1146-47). The *Garner* Court expressly declined to follow the reasoning of the First Circuit in *Honneus* or the Sixth Circuit in *U.S.* v. *Adcock,* 487 F.2d 637 (6th Cir., 1973). The Court in *Garner* preferred the cumulative-consecutive sentencing exposure as adopted by the Fifth Circuit in *U.S.* v. *Houltin,* 525 F.2d 943 (5th Cir., 1976) as modified, 553 F.2d 991 (5th Cir., 1977). The Fifth Circuit is apparently in parity with the Ninth Circuit, *U.S.* v. *Marotta,* 518 F.2d 681 (9th Cir., 1975).

Stated otherwise the Fourth, Fifth and Ninth Circuits opt for consecutive sentences while treating related conspiracies while the First and Sixth Circuits claim cumulative sentencing is barred for separate but related conspiracies. In the case at bar the Seventh Circuit has seemingly joined the Fourth, Fifth and Ninth Circuits in allowing cumulative sentencing notwithstanding a single continuing scheme.

(5th Cir., 1977) the Court affirmed multiple weapons convictions, but vacated cumulative sentences. The Court found that where the sentencing was cumulative it could not stand. Consecutive sentences and fines were struck even though the firearm(s) in *McDaniel* violated separate subsections of the same statute (26 U.S.C. §5861, *et seq.*). The *McDaniel* Court based its decision, striking consecutive sentences, on decisions from other Circuits (550 F.2d 218, 219).[6] In *U.S.* v. *Kalama,* 549 F.2d 594 (9th Cir., 1976) the Court found that notwithstanding the fact that *Kalama* was charged with five (5) separate weapons the imposition of consecutive sentences was unlawful. While vacating the consecutive sentences the Court stated:

> Appellant's final assignment of error has merit. Both possession and making of an unregistered firearm violate the National Firearms Act, 26 U.S.C. §5861(d) and (f). The imposition of consecutive sentences for possessions (count I) and making (count IV) the same firearm, the "Nylon 66" rifle, constitute an unlawful pyramiding of punishments. *United States* v. *Clements,* 471 F.2d 1253, 1257 (9th Cir. 1972). Furthermore, the imposition of consecutive sentences for possession (count V) and making (count VI) of the Stevens shotgun also unlawfully pyramided the punishment appellant received.
>
> The conviction of appellant is affirmed. The sentence is vacated and the cause is remanded to the district court for resentencing to a term not to exceed the maximum punishment than can be imposed in light of this court's decision in *United States* v. *Clements, supra.* 549 F.2d at 597

[6] Inter alia, the *McDaniel* Court, while vacating cumulative sentences, cited to *U.S.* v. *Ackerson,* 502 F.2d 300 (8th Cir., 1974) and *U.S.* v. *Tankersely,* 492 F.2d 962 (7th Cir., 1974). In *Tankersely* the Seventh Circuit ruled:

> "This contention was answered by the Ninth Circuit in *United States* v. *Clements,* 471 F.2d 1253, (1972), and we adopt its reasoning. While agreeing that the statute did not authorize cumulative punishment for violations of three different sections of 26 U.S.C. § 5861, *the court affirmed the defendants' conviction but limited the maximum punishment to that which could be imposed for a single violation.* The sentences given in the present case do not exceed that maximum, and accordingly were not improper." (492 F.2d at 969)

Narcotic cases, even prior to *Jeffers,* had not been overlooked. In *Goodson* v. *U.S.,* 564 F.2d 1071 (4th Cir., 1977) the defendant had been sentenced to two (2) separate *concurrent* fifteen (15) year prison sentences for the offenses of possession with intent to distribute and distributing heroin (id at 1072). On appeal, *inter alia, Goodson* claimed that the sentencing was improper, notwithstanding its *concurrent* terms. In pertinent part, the Court agreed and vacated one of the two (2) prison sentences stating:

> "One of Goodson's sentences must be vacated. He was convicted of possession of heroin with intent to distribute and of distribution of heroin. He received concurrent fifteen year sentences for each count, with a special parole term for each count as well.

Under the doctrine of *Prince* v. *United States,* 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957), there may not be cumulative sentencing for the offense of possession of heroin with intent to distribute and the offenses of distribution of heroin when it is "not shown" that the defendant had possession "separately from the moment in which the heroin was transferred to the gov-

ernment agent." *United States* v. *Atkinson,* 512 F.2d 1235, at p. 1240 (4th Cir. 1975)." 564 F. 2d at 1073[7]

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[7] In accord, *U.S.* v. *Henicar,* 568 F.2d 489 (6th Cir., 1977 . . . remanding for re-sentencing where two (2) concurrent six (6) year sentences were imposed for a series of narcotics transactions. In *U.S.* v. *Woods,* 568 F.2d 509 (6th Cir., 1978) the Court vacated and remanded, for re-sentencing, a situation where a multi-count indictment charged various heroin violations. The Court reviewed, at length, the various questions of merger and cumulative sentencing (id 510-513). In *Woods* the Court allowed only a single sentence to stand, and analyzed the sentencing aspect as follows:

> "*Gore* v. *United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), relied upon by the government, is inapposite. In *Gore,* the issue was whether a single narcotics sale could give rise to convictions for violating three different statutory provisions. In sustaining the convictions, the Court reaffirmed the rule of *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which, as noted above, provides that two offenses can derive from the same act if each provision requires proof of a fact which the other does not. See *generally* 1 C. Wright, Federal Practice and Procedure § 142 (1969).
>
> Here we are not concerned with whether a single act violates a multiplicity of statutes as in *Gore* and *Blockburger.* Rather, we face what the Supreme Court has recognized to be a different issue: whether a course of conduct—here, possession with intent to distribute—can result in multiple violations of the same statute. *Gore, supra,* 357 U.S. at 391, 78 S.Ct. 1280; *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952). Our court has held that the *"same facts"* test in *Blockburger* is inapplicable to offenses charging a course of conduct, at least where Congress has not indicated the appropriate unit of prosecution. *Jones, supra,* 533 F.2d at 1391-92. *But cf. United States* v. *Agy,* 374 F.2d 94, 95 (6th Cir.) (per curiam), *cert. denied,* 389 U.S. 881, 88 S.Ct. 123, 19 L.Ed.2d 175 (1967)." 568 F.2d 513, 514, fn. 1.

A recent deportation-immigration case brought similar results. In *U.S.* v. *Ortiz-Martinez,* 557 F.2d 214 (9th Cir., 1977), the defendant was charged and convicted of both counts in an indictment which charged him (in separate counts) with violating 8 U.S.C. §1325 and §1326. *Martinez* was given separate consecutive sentences. The Court set aside the consecutive sentences and analyzed cumulative sentencing (id at 216, 217). The question boils down to punishing for acts which constitute one illegal transaction, or more than one illegal transaction, even though the conduct is identical (id at 216, 217). While vacating the consecutive sentences the Court, in part, stated:

> Congress did not express an intent to pyramid the punishment of the alien who violated both statutes in a single transaction.
>
> *Bell* v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), expressed a policy of not attributing to Congress an intent to punish more severely than the statutory scheme clearly indicates. *See also Prince* v. *United States,* 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). Furthermore, while we recognize that the *Clements* case involved a different statute than those interpreted here, we believe that the principle of *Clements* militates against breaking this essentially unitary transaction into its component parts in order to exact consecutive sentences.
>
> The sentence is vacated and the cause is remanded for resentencing as a single offense. (557 F.2d at 217)

Another interesting analysis of pyramiding is found in *U.S.* v. *Golay,* 560 F.2d 866 (8th Cir., 1977). *Golay* had been charged in separate counts with both bank robbery (21 U.S.C. §2113 (b), (d)) and violating the Hobbs Act (18 U.S.C. § 1951). From the denial of a Rule 35 sentence modi-

fication *Golay* appealed. The Court, on review, found that the armed bank robbery could, indeed, support both the Hobbs Act and the bank robbery violations. However, the court directed that the Hobbs Act sentence be vacated. This, notwithstanding the fact that the court found that the single act could be violative of both federal statutes (e.g., 18 U.S.C. §1951 and §2113 (b), (d). The *Golay* Court provides additional insight into the current question of cumulative punishment.

In *Grice* v. *U.S.*, 567 F.2d 628 (5th Cir., 1978) the Court declined to vacate cumulative fines (which exceeded that which could have been imposed on any single count) stating:

> In this appeal from the denial of a section 2255 motion to vacate sentence, petitioner contends that the district court lack authority, in sentencing petitioner after conviction of multiple counts, to impose *concurrent* prison sentences and *cumulative* fines (which, in total, exceeded the fine that could have been imposed on any given count.) While this court has not previously been called upon to consider the propriety of such sentencing, we have expressly noted its practice in this circuit, see *United States* v. *Scott*, 555 F.2d 522, 525, n. 1 (5th Cir.) *cert. denied*, ... U.S. ....., 98 S.Ct. 610, 54 L.Ed.2d 478 (1977); *United States* v. *Parr*, 509 F.2d 1381, 1383 (5th Cir. 1975) and we fail to perceive its claimed statutory or constitutional invalidity in a case such as this one. Finding petitioner's remaining contentions to be meritless, we affirm the judgment of the district court.
>
> 567 F.2d at 628[8]

[8] Cf., *U.S.* v. *Tankersely*, 492 F.2d 962 at 969 (7th Cir., 1974).

The petitioner at bar is hardly a modern day Robin Hood. The government proved that he devised a single "continuous scheme" using the mails to bilk citizens out of approximately $18.00 per person for the promised delivery of digital watches. Each and every count in the indictment was included in Count I (as was every victim). Petitioner was convicted of all 50 counts. Making no excuse for his less than commendable conduct, we respectfully suggest that the mail fraud statute was not designed for the imposition of cumulative or "pyramiding" in a case such as the one at bar. The maximum punishment available to the government was five (5) years in prison and a $1,000 fine. Notwithstanding this maximum potential . . . petitioner received at least eight (8) years in custody and cumulative fines which apparently exceed $50,000. In addition he was committed to lengthy period of probation to follow the custody and was compelled to provide *restitution.*[9] With the Circuits hardly in accord[10] and the decisions of this Court in both *Jeffers* and *Simpson,* we respectfully suggest that the petitioner at bar be granted this writ of certiorari and that this Court vacate and remand this case for the imposition of a sentence that is neither cumulative nor pyramided.

[9] The Court of Appeals remanded the restitution portion of this sentence.

[10] *Grice* v. *U.S.*, 567 F.2d 628 (5th Cir., 1978); *U.S.* v. *Austin*, 529 F.2d 559 (6th Cir., 1976). In *Austin* the Court vacated a sentence on the conspiracy count where the evidence was the same as to both the substantive offenses and the conspiracy count. In the case at bar the evidence as to Count 1 of the indictment was the same as was needed to prove Counts 2 through 50. Thus, the *Austin* rationale would call for sentence modification.

CONCLUSION

As to Question 1 the petitioner respectfully prays that his conviction be vacated and he be granted a new trial. As to Question 2 petitioner respectfully prays that his sentence be vacated and the cause remanded for the imposition of a sentence that is neither cumulative nor pyramided.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 13, 1978)
June 27, 1978

Before
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-1743 *vs.*

DENNIS L. ROBERTS,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
No. 77-CR-53
JOHN P. CROWLEY, Judge.

ORDER

Defendant appeals from his conviction of 50 counts of mail fraud. At trial, defendant was shown to have solicited $1.7 million in prepayments from prospective purchasers of nonexistent digital watches and calculators. His argu-

ments on appeal are (1) that the district court erred in not dismissing a biased juror and (2) that his consecutive sentences exceeded the statutory maximum. We affirm defendant's conviction and remand the cause to the district court for clarification of that portion of the sentence regarding restitution.

Defendant's first argument is that he was deprived of his right to an impartial jury because the district court denied his motion to remove a juror who stated that she personally knew one of the government's witnesses and that she "might tend" to give more weight to the witness' testimony than would another juror. (Tr. 584.) After summoning the juror for questioning by himself and counsel, the trial judge found that the juror would weigh all of the evidence fairly for both sides before making a decision. (Tr. 592-95.) The test for juror disqualification is whether the juror holds such an opinion as to raise a presumption of partiality. *Reynolds* v. *United States,* 98 U.S. 145, 156 (1878); *United States* v. *Largo,* 346 F.2d 253, 256 (7th Cir.) *cert. denied,* 382 U.S. 904 (1965). This determination is particularly within the province of the trial judge who can observe the demeanor of the juror during questioning. *United States* v. *Ploof,* 464 F.2d 116, 118 (2d Cir.), *cert. denied,* 409 U.S. 952 (1972). Thus, while perhaps impaneling an alternate juror may have been preferable, the trial judge did not abuse his discretion in refusing to remove the juror.

Defendant's second argument is that his sentence was excessive. Defendant received concurrent five year prison terms for Count 49, and a suspended sentence—five year probation on Count 50 subject to restitution. Defendant was also cumulatively fined $1,000 on Counts 1-50. He argues that the district court wrongly "pyramided" sentencing

since, in single-scheme mail fraud cases, separate mailings should not be viewed as separate offenses. We specifically rejected this argument in *United States* v. *Aldridge,* 484 F.2d 655, 660 (7th Cir. 1973), *cert. denied,* 415 U.S. 921 (1974). Therefore, since each sentence was within the five year/$1,000 fine maximum of 18 U.S.C. 1341, the sentences were proper. However, the government has noted that a question exists on the restitution portion of the sentence on Count 50 as to who are the aggrieved parties and what is the amount of actual damages caused. 18 U.S.C. § 3651. *See United States* v. *Hoffman,* 415 F.2d 14, 22-23 (7th Cir.), *cert. denied,* 396 U.S. 958 (1969). We therefore remand for clarification of the terms of restitution.

For the reasons stated above, the defendant's conviction is affirmed and the cause remanded for the purpose of partial resentencing on the condition of probation.

Affirmed in Part and Remanded.

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1978

Before
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-1743 *vs.*

DENNIS L. ROBERTS,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 77-Cr-53
JOHN POWERS CROWLEY, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed as to the defendant's conviction, and the cause is Remanded for the purpose of partial resentencing on the condition of probation, in accordance with the order of this Court entered this date.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

vs.

DENNIS L. ROBERTS, also known as JOHN RODINE, also known as JACK RODINE, also known as J. RODINE, also known as FLOYD HIGHSTROM
No. 77 CR 53
Violation: Title 18, United States Code, Section 1341

The Special November 1975 Grand Jury charges:

1. Beginning in or about August, 1976, and continuing thereafter until the filing of this indictment, in the Northern District of Illinois, Eastern Division, and elsewhere,

DENNIS L. ROBERTS, also known as
JOHN RODINE, also known as
JACK RODINE, also known as
J. RODINE, also known as
FLOYD HIGHSTROM (hereafter referred to as DENNIS L. ROBERTS),

defendant herein, devised and intended to devise a scheme and artifice (1) to defraud and to obtain money from a certain class of persons (hereafter referred to as purchasers), including but not limited to the following persons:

J. Q. Scott Adams
Sam Ashcraft
William Bennett
Stanley Berlin
Carolyn Biggs
Barbara Bradford
Mrs. Richard Button
Donna Chapman
Jeremiah Cocola, Jr.
Mildred F. Cook
Gary A. Correll
Mrs. Donald H. Eide
Gerald Faust
Joyce Foley
Ludwig Fritsch, Jr.
Pauline Gatchell
Delores Gerchman
Mrs. J. R. Gore
Michael Greer
Zoe Gresham
Manuel Halperin
Lester Hartrick
June M. Hotchkiss
Patricia L. Knapp
Mrs. Larry Liddell
Trudy Maloney
Robin Mays
Lois McMain
Warren L. Meinhardt
Carl Moore
Sharon Key Nunemacher
Thelma Ortega
A. J. Pickett

Russell Pierre, Jr.
Eliseo Pilco
Reverend James Pomann
Donald A. Prejean, Sr.
Sam Radzin
Marilyn Raezer
Deborah A. Rennerd
Elizabeth Thronson Rodenkirch
Faye Roman
John Senden
Henry Schimmel
Kathy Shelton
David Smith
William T. Stone
W. Kent Weigman
Luana Whitaker
Flora Whitney
Patricia Zillmer

in that he did solicit from said purchasers orders and advance payments for the purchase of digital wristwatches and calculators, then full well knowing and intending not to provide said digital wristwatches, calculators and refunds; and (2) to defraud and obtain property and services from various businesses, (hereafter referred to as businesses), including but not limited to the following:

Christenson, Barclay & Shaw, Inc.
Olsten Temporary Services
Western Temporary Services, Inc.
doing business as Western Girl Division
White Collar Girls of America, Inc.

in that he did solicit and obtain from them various services, then full well knowing and intending not to pay for all said services.

2. It was part of said scheme and artifice that defendant Dennis L. Roberts would and did use the names and assume the identities of John Rodine, Jack Rodine, J. Rodine and Floyd Highstrom.

3. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did adopt and purport to do business under the tradename Teltronics of which he was president, sole proprietor, sole incorporator and sole shareholder.

4. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did incorporate in the State of Illinois under the name Teltronics, and in so doing did provide a false and fraudulent address of the incorporator to the Secretary of State of the State of Illinois.

5. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did rent and occupy office space under the name Teltronics at the following locations:

a. 2400 East Devon Avenue
Suites 247 and 249
Des Plaines, Illinois

b. 2590 East Devon Avenue
Suites 201-03
Des Plaines, Illinois

6. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did provide a false and fraudulent name and home address in renting the office space referred to in paragraph 5 of this indictment.

7. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did rent warehouse space under the name Teltronics at:

6135 West 60th Street
Chicago, Illinois

to induce purchasers, businesses and others into believing that said space was being used and was intended to be used to store digital wristwatches and calculators, whereas, the defendant then knew said space was not and would not be used to store digital wristwatches and calculators.

8. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did open and cause to be opened in the name Teltronics checking accounts at various banks including but not limited to:

a. O'Hare International Bank, Chicago, Illinois;

b. The Des Plaines Bank, Des Plaines, Illinois;

c. The First National Bank of Morton Grove, Morton Grove, Illinois; and

d. The American National Bank and Trust Company, Chicago, Illinois;

for the purpose of providing a facility for the deposit of monies received from the purchasers.

9. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, in opening said accounts referred to in paragraph 8 of this indictment provided a fraudulent social security number.

10. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, contracted with Olsten Temporary Services, Western Tempo-

rary Services, Inc., doing business as Western Girl Division, and White Collar Girls of America, Inc. for the purpose of staffing the office referred to in paragraph 5 of this indictment.

11. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did contract with United Parcel Service to induce purchasers, businesses and others into believing that he intended to ship digital wristwatches and calculators.

12. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did retain the services of Christenson, Barclay & Shaw, Inc., an advertising agency, to prepare an advertisement for Teltronics soliciting orders and advance payments for the purchase of digital wristwatches and calculators.

13. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did cause Christenson, Barclay & Shaw, Inc., to place advertisements for Teltronics in T.V. Guide and Parade Magazine soliciting orders and advance payments for the purchase of digital wristwatches and calculators then knowing and intending that he would not deliver the said digital wristwatches and calculators and not make refunds to purchasers.

14. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did adopt, control and use the tradename Creative Media Specialists to place advertisements for Teltronics in various local and college newspapers throughout the United States, said advertisements soliciting orders and advance payments for the purchase of digital wristwatches and calculators to be sent to 2400 East Devon, Des Plaines, Illinois;

the defendant then knowing and intending that he would not deliver the said digital wristwatches and calculators and not make refunds to purchasers.

15. It was further part of said scheme and artifice that defendant, Dennis L. Roberts, using the name Rodine, would and did cause the said advertisements to falsely and fraudulently represent and promise to the purchasers as follows:

a. That Teltronics was an established firm that had sold over a million wristwatches;

b. That Teltronics manufactured and sold solid state wristwatches worldwide;

c. That Teltronics would sell quality crafted solid state watches at $16.95 and $17.95 plus $1.00 for shipping;

d. That Teltronics would repair or replace any defective watch within one year of purchase;

e. That Teltronics would send watches to purchasers on a thirty day trial period;

f. That ten styles of watches depicted in the Teltronics advertisements were being offered for sale;

g. That all orders for watches received by Teltronics before December 15, 1976, would be deelivered to the purchaser before Christmas Day, December 25, 1976;

h. That the watches ordered by the purchasers would come in a jewelry-case gift box;

i. That if two or more watches were ordered, the purchaser would also get a free calculator,

then full well knowing and intending that said representations and promises were false when made.

16. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, for the purpose of deceiving some of said purchasers into a false sense of security, sent and caused to be sent a notice to them stating that their orders had been received, that the orders were being processed and that they would receive their digital wristwatches and/or calculators by Christmas Day, December 25, 1976, then full well knowing and intending that said representations and promises were false when made.

17. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did falsely and fraudulently represent and promise to Olsten Temporary Services, among other things, the following:

a. that Teltronics had a factory in Hong Kong which manufactured watches;

b. that Teltronics was going to sell watches in the United States;

c. that Teltronics would pay for the services provided by Olsten Temporary Services;

then full well knowing and intending that said representation and promises were false when made.

18. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did falsely and fraudulently represent and promise to Western Temporary Services, Inc., doing business as Western Girl Division, among other things, the following:

a. that Teltronics was a Hong Kong based firm which was primarily a mail order business;

b. that his family was in Hong Kong, where he had lived for twenty years;

c. that Teltronics would pay for the services provided by Western Temporary Services, Inc., doing business as Western Girl Division;

then full well knowing and intending that said representations and promises were false when made.

19. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, would and did falsely and fraudulently represent and promise to White Collar Girls of America, Inc., among other things, the following:

a. that Teltronics' principal place of business was Hong Kong;

b. that Teltronics would pay for the services provided by White Collar Girls of America, Inc.;

then full well knowing and intending that said representations and promises were false when made.

20. It was further part of said scheme and artifice that in or about November, 1976 through in or about December, 1976, the defendant Dennis L. Roberts, using the name Rodine, deposited and caused to be deposited advanced payments received from purchasers totalling approximately $1,700,000.00 into bank accounts referred to in paragraph 8 of this indictment.

21. It was further part of said scheme and artifice that after receiving the advanced payments from the purchasers, the defendant Dennis L. Roberts, using the name Rodine, would and did receive repeated demands from said purchasers for the promised digital wristwatches and/or cal-

culators or refunds, which repeated demands the defendant did not respond to.

22. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, did issue and cause to be negotiated checks, payable to Rodine, in the amount of $70,500.00 drawn on the Teltronics bank account at the O'Hare International Bank, for the purpose of converting said monies to his own use.

23. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, did issue and cause to be negotiated checks, payable to Rodine or to cash, in the amount of $16,800.00, drawn on the Teltronics bank account at the First National Bank of Morton Grove for the purpose of converting said monies to his own use.

24. It was further part of said scheme and artifice that defendant Dennis L. Roberts, using the name Rodine, did issue and cause to be negotiated checks, payable to Rodine or to cash, in the amount of $43,829.00 drawn on the Teltronics bank account at the Des Plaines Bank for the purpose of converting said monies to his own use.

25. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $300,000.00 from the Teltronics bank account at the O'Hare International Bank to the Financiera Metropolitana Juarez, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

26. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $53,000.00

from the Teltronics bank account at the First National Bank of Morton Grove to the Financiera Metropolitana Juarez, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

27. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $27,000.00 from the Teltronics bank account at the Des Plaines Bank to the Financiera Metropolitana Juarez, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

28. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $57,000.00 from the Teltronics bank account at the Des Plaines Bank to the Banco National de Mexico SA, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

29. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $300,000.00 from the Teltronics bank account at the American National Bank and Trust Company to the Financiera De Fomento Industrial SA, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

30. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, wired approximately $101,000.00 from the Teltronics bank account at the O'Hare International Bank to Precious Metals, Inc., Los Angeles, California, for the purpose of converting said monies to his own use.

31. It was further part of said scheme and artifice that in or about December, 1976, defendant Dennis L. Roberts, using the name Rodine, attempted to wire approximately $350,000.00 from the Teltronics bank account at the O'Hare International Bank to the Banco National De Mexico SA, a bank in Mexico City, Mexico, for the purpose of converting said monies to his own use.

32. It was further part of said scheme and artifice that in or about January, 1977, defendant Dennis L. Roberts, would and did obtain a safety deposit box at the Continental Bank of Milwaukee under the name Floyd Highstrom and under a false and fraudulent address.

33. On or about November 23, 1976,

DENNIS L. ROBERTS, also known as
JOHN RODINE, also known as
JACK RODINE, also known as
J. RODINE, also known as
FLOYD HIGHSTROM,

defendant herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, knowingly and wilfully did cause Patricia Zillmer to place and cause to be placed in an authorized depository for mail matter an envelope containing a check in the amount of $37.34, for aforesaid envelope being addressed to:

Teltronics
2400 East Devon
Des Plaines, Illinois 60018

which was delivered by mail by the United States Postal Service, in the Northern District of Illinois, Eastern Division, according to the direction thereon;

In violation of Title 18, United States Code, Section 1341.

APPENDIX C

UNITED STATES v. ROBERTS 77 CR 53

Article from Chicago Tribune dated Wednesday, May 18, 1977.

DOCKETED MAY 19 19

politan Section 3

Jury told of $1.7 million wristwatch fraud scheme

By Lee Strobel

A LAKE FOREST man set up an elaborate plan to defraud thousands of persons in a phony digital-watch sales scheme and then "tried to walk away with $1.7 million," a federal prosecutor charged Tuesday.

But the man's attorney accused the government of harassing a legitimate business enterprise.

Assistant U.S. Atty. Ann C. Williams told a jury in opening statements Dennis L. Roberts, 45, received $1.7 million in two months in the alleged mail-order scheme and then tried to pocket the money by writing checks to himself, buying gold coins, and transferring funds to Mexican banks.

[redacted] who started Teltronics, Ltd., last August in Suburban Des Plaines, is charged with 50 counts of mail fraud before U. S. District Court Judge John Powers Crowley.

Williams contended Roberts, using the name of Jack Rodine, took took advantage of Christmas shoppers last year by advertising watches in TV Guides, Parade, and other magazines and newspaper supplements.

Th ads offered "computer watches" for $16.95 and $17.95, plus a free calculator as a bonus for those ordering two or more watches. Delivery by Christmas was guaranteed if orders were received by Dec. 15.

When Christmas approached, thousands of customers who had not received their watches complained to state and local authorities. Meanwhile, in the two months before Christmas, Roberts deposited $1.7 million in Teltronics' accounts in four area banks. In December, Williams said, Roberts wired $737,000 to three Mexican banks and wrote checks to himself or to cash for an additional $134,129.

ROBERTS APPARENTLY fled to Mexico and tried transferring another $635,000 to Mexican banks but was blocked when Illinois Atty. Gen. William J. Scott went to court Dec. 29 to have Teltronics' bank accounts frozen, Williams said.

Roberts was arrested Jan. 21 in his home, 551 Crest Ct., Lake Forest. He has been held in lieu of $500,000 bond since then.

Allan Peters, Roberts' attorney, told the jury the actions by Scott's office were "a classic example of government intervention frustrating a legitimate business enterprise."

Peters said Roberts had no intention to defraud anyone. He said Teltronics became unable to pay creditors or operate because Scott's office moved too quickly to shut down the firm.

Suburban official charged in $100,000 extortion plot

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Walker ran up
said. The state pa
said former Gov. Richard Ogilvie also was p
six months after he left office after losing to Walker in 1972. The Pantagraph said Walker appeared to be using the car driving to his private law offices in several cities.

Metropolitan briefs

Skinner submits

Teltronics doing nothing sinister: defense lawyer

A Des Plaines-based business, which sought to sell digital watches through the mail, was halted prematurely because of "a business frustration and intervention by the Illinois attorney general," a defense attorney said in federal court Tuesday.

The attorney, Allan Peters of Arlington Heights, made the statement in opening remarks of the trial of Dennis L. Roberts, accused of 50 counts of mail fraud in the operation of his firm, Teltronics Ltd.

Peters said the defense would attempt to show that Roberts intended to carry out his business and planned "nothing sinister" by using several aliases in operation of Teltronics.

HE SAID THE business was unfairly halted by Illinois Atty. General William J. Scott in late December and Teltronics' bank accounts frozen.

But Assistant U. S. Atty. Ann Williams told the jury of eight women and four men that Roberts, 45, devised a six-phase scheme to defraud thousands who ordered watches, for $16.95 and $17.95, but never received them.

She said the six-phase scheme included assuming a false identity — that of "John Rodine" — and creating a company; contracting with other companies to provide services for Teltronics; mounting an advertising campaign; obtaining money and channeling it to Teltronics bank accounts; syphoning off the money by buying gold coins and transferring the money to Mexican banks; and assuming a new identity to take the money obtained by Teltronics.

The government called seven witnesses Tuesday in the first day of Roberts' trial, including representatives of United Parcel Service, TV Guide magazine, an advertising company and a Chicago warehouse. All said they had been contacted by Roberts to provide services but that Roberts had failed to pay all his bills and in some cases not paying anything.

Roberts, being held at the Metropolitan Correction Center in lieu of $500,000 cash bond, is accused of garnering some $1.7 million in the business which purported to sell digital watches. The case before U. S. District Judge John P. Crowley will continue today.

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defendant loses dismissal bid

A federal judgt in Chicago Monday refused to dismiss the indictment against Dennis L. Roberts, accused of bilking thousands in a Des Plaines-based mail order digital watch sale scheme.

U.S. District Judge John P. Crowley denied the motion to dismiss as well as an accompanying motion to suppress evidence against Roberts which had been gathered by the consumer fraud division of Illinois Atty. Gen. William J. Scott's office.

Opening arguments will begin today in the case against Roberts, on trial for allegedly using the mails to defraud thousands who ordered $16.95 digital watches from Roberts' now-defunct company, Teltronics Ltd.

ROBERTS, 45, OF Lake Forest, is charged with 50 counts of mail fraud and has been held since Jan. 20 in Cook County Jail in lieu of $500,000 cash bond.

The government has charged that Roberts collected some $1.7 million by purporting to sell digital watches and calculators. Scott's office and, later, the U.S. attorney's office began investigating the operation in December when scores of persons from across the country complained of never receiving the watches.

A jury of eight women and four men was selected Monday to decide the case.

Crowley Monday ruled against both defense motions to suppress evidence and to dismiss the indictment following an hourlong hearing.

DURING THE HEARING Roberts' attorney, William Tomlinson and Allan Peters of Arlington Heights, accused the government of being "slipshod" and denying Roberts' rights to a fair trial because agents failed to keep seized Teltronics documents in sealed boxes.

The documents wire taken Dec. 30 from the Teltronics offices at 2400 and 2590 Devon Ave. and were kept in open boxes at the attorney general's Chicago office. The documents had been taken under a Cook County Circuit Court temporary restraining order issued against the firm.

The evidence was held until it was subpoenaed several weeks later by a federal grand jury.

Assistant U.S. Atty. Ann Williams, who is one of three government lawyers prosecuting the case, testified Monday that the inventory of the evidence taken by lawyers for Scott's office was inventoried when the documents were brought to the U.S. attor-

APPENDIX D

UNITED STATES v. ROBERTS 77 CR 53

5/19

Question from juror.

Judge Crowley:

I know personally, as a friend, one of the witnesses who appeared this morning. If there is anything more I should tell you please let me know.

/s/ Cathy O'Brien

APPENDIX E

July 15, 1977

RULING ON POST TRIAL MOTIONS AND SENTENCING

It Is Adjudged that on each of Counts 1 through and including 48 defendant is committed to the custody of the Attorney General for imprisonment for a term of Five (5) Years and fined the sum of $1,000.00. Said sentences of imprisonment are to run concurrent to each other.

It Is Adjudged that on Count 49 defendant is committed to the custody of the Attorney General for imprisonment for a term of Three (3) Years and fined the sum of $1,000.00. Said sentence of imprisonment to run consecutive to sentences imposed on Counts 1 through 48.

It Is Adjudged that on Count 50 imposition of sentence as to imprisonment only is suspended and defendant is placed on probation for a period of Five (5) Years and fined the sum of $1,000.00, on the condition that defendant make restitution.

Said term of probation to commence upon the expiration of the term of parole on Counts 1 through 49. Fines imposed on Counts 1 through 50 are cumulative. (Draft) Bond on appeal set at One Million ($1,000,000.00) Dollars/secured.

/s/ *John Powers Crowley*

Supreme Court, U. S.
FILED
SEP 22 1978
MICHAEL RODAK, JR., CLERK

No. 78-125

In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

T. GEORGE GILINSKY,
JOHN T. BANNON, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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DENNIS L. ROBERTS, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1978. The petition for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by newspaper accounts of his trial.

2. Whether the district court erred in refusing to dismiss a juror who knew one of the government's witnesses.

3. Whether petitioner's sentence was proper under the mail fraud statute (18 U.S.C. 1341).

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Illinois on 50 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to separate fines of $1,000 on each count. In addition he was sentenced to concurrent terms of five years' imprisonment on counts one through forty-eight; a consecutive term of three years' imprisonment on count forty-nine; and five years' probation on count fifty, on condition that he make restitution. The court of appeals affirmed and, at the suggestion of the government, remanded the sentence on count fifty for clarification of the terms of restitution (Pet. App. 3).

Petitioner acknowledges that the evidence was sufficient to sustain the conviction (Pet. 21). Briefly, it showed that petitioner advertised digital wristwatches for sale in *TV Guide* magazine and received by mail approximately $1,700,000 in prepaid orders from thousands of customers. Petitioner never sent any watches to these customers, and never had any intention of doing so (Tr. 75-94, 129-159, 535, 203-210, 352-361, 837-839, 226-228).

ARGUMENT

1. Petitioner contends (Pet. 2, 7-9) that his conviction should be reversed because there was an "abundance" of newspaper publicity and "inadequate inquiry" into its possible prejudicial effect. But unlike *Marshall* v. *United States*, 360 U.S. 310, where jurors read newspaper accounts of the defendant's previous felony record, there is no indication here that any juror read or heard anything that would have been inadmissible as evidence. On the contrary, the district court questioned the jurors

about several newspaper articles and a radio broadcast pertaining to the trial. As petitioner acknowledges (Pet. 4), each of the jurors told the court he could be fair notwithstanding anything he had read or heard (Tr. 264-275). Several of the jurors stated that they had made a deliberate decision not to read the articles. The jurors also promised not to read or listen to any coverage of the case (Tr. 274). Thus, petitioner has made no colorable showing of any prejudice whatever. See *Irvin* v. *Dowd*, 366 U.S. 717.

2. Petitioner contends (Pet. 8-12) that he was prejudiced by the district court's refusal to dismiss a juror who was acquainted with one of the government's witnesses. The full record refutes this claim. During the trial, the court received a note from Ms. O'Brien, one of the jurors, indicating that she knew Mr. Pierchala, one of the government's witnesses. The judge questioned Ms. O'Brien in chambers (Tr. 583-584).

> Q. And let me ask you this question: Do you feel that because of your friendship with Mr. Pierchala that that would affect your ability to sit as a juror in this case?
>
> A. No. I will weigh the evidence as I hear it and as I feel it. I just want everyone to know that because of our friendship I might tend to believe more than perhaps another juror, because of my past experience with him, but there would be no other weight attached to that.
>
> Q. But you feel that you can still keep an open mind as to all the evidence in the case and wait until you have heard all the evidence?
>
> A. Yes.

The judge later continued in open court (Tr. 589-590):

Q. As I understand your answer, you stated that because of your friendship with Mr. Pierchala you might tend to give his testimony more credibility than another juror would give, is that right?

A. It could possibly be.

Q. It could possibly be?

A. I don't know, I don't really know.

Q. You don't really know? Do you feel now—I think I asked you before in Chambers, and I have repeated your answers to counsel here—that you can keep, number one, insofar as the evidence is concerned, an open mind until you have heard all of the evidence in the case?

A. Yes, I do.

Q. And that you would, at the conclusion of the case, follow the law as I give it to you, including how a juror is to judge the credibility of witnesses.

A. Upon your instruction?

Q. Yes.

A. Yes, I would follow that.

Q. You would follow my instructions?

A. Yes.

Petitioner's counsel then questioned Ms. O'Brien (Tr. 590-593):

[COUNSEL]: [Do you] respect [Mr. Pierchala's] judgment?

[MS. O'BRIEN]: Insofar as my dealings with him, yes.

[COUNSEL]: All right, you think that you would respect his judgment perhaps more than some other witness whom you haven't even heard yet, because of your relationship with him outside of this courtroom?

[MS. O'BRIEN]: I don't believe I heard judgments, I believe I heard evidence.

[COUNSEL]: Would you tend to give his testimony more credibility than that of some other witness who might testify in some way inconsistent with his testimony, because of matters that your friendship and matters that have occurred outside the courtroom? That is really the question. It is not an easy question, is it?

[MS. O'BRIEN]: It isn't easy.

[COUNSEL]: No.

[MS. O'BRIEN]: I see this man approximately twice a year. A couple of years ago we worked very hard on a project, but as far as a continual friendship on a continuing basis, I guess you would say it would not be, and I know nothing about his business. I just know him as a person and I can't say

whether inadvertently, because of my feelings, I might believe him more than another witness, perhaps. I would have [to] weigh it all.

[COUNSEL]: Thank you. I have nothing further.

[THE COURT]: In other words, Mrs. O'Brien, you say, on your oath, that you would weigh all the testimony?

[MS. O'BRIEN]: I would weigh all the testimony.

[THE COURT]: And you wouldn't let that acquintanceship and that work that you had with this witness affect your judgment?

[MS. O'BRIEN]: No.

The court had ample opportunity to observe the juror's demeanor and to listen to her answers. Petitioner's counsel had full opportunity to question the juror but failed to raise the contention of bias from "the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U.S. 162, 168. Petitioner recognizes (Pet. 11) that he has the burden of showing bias. He has not done so. While it would perhaps have been the safer course to substitute an alternate juror, the trial court did not abuse its discretion under all the circumstances in refusing to remove the juror, and the issue does not merit further review by this Court.

3. Finally, petitioner contends (Pet. 13-21) that the district court erred in sentencing him on each count for a continuing scheme under the mail fraud statute, 18 U.S.C. 1341. Excluding probation and restitution,

petitioner was sentenced to eight years in prison and fined $50,000, but he urges that the maximum sentence he could be given was five years and $1,000. This contention is frivolous. It has long been settled that each use of the mails constitutes a separate offense under 18 U.S.C. 1341. *Badders* v. *United States*, 240 U.S. 391. There is no reason now for the Court to accept petitioner's invitation (Pet. 14) to re-examine *Badders*.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

T. GEORGE GILINSKY,
JOHN T. BANNON, JR.,
Attorneys.

SEPTEMBER 1978.

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[1]Petitioner's reliance on *Simpson* v. *United States*, No. 76-5761, decided February 28, 1978, and *Jeffers* v. *United States*, 432 U.S. 137, is misplaced. In *Simpson* and *Jeffers* this Court disallowed cumulative punishment for a single transaction that violated more than one criminal statute. The instant case does not involve a single transaction but repeated violations of the mail fraud statute.

DOJ-1978-09